SUPREME COURT, U. S.

No. 590

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In The

Supreme Court of The United States

RALPH J. PERK, Cuyahoga County Auditor,
Appellant,

v.

THE STATE OF OHIO, ON THE RELATION OF JOHN T. CORRIGAN, PROSECUTING ATTORNEY OF CUYAHOGA COUNTY, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

REPLY TO MOTION TO DISMISS OR AFFIRM

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October Term, 1969

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STATEMENTS

It is obvious from reading the Motion to Dismiss, etc., filed by Appellee, that this controversy had its origins in a heated political squabble. Appellee has seen fit to perpetuate this squabble regardless of the constitutional rights of the people of Cuyahoga County; people who also elected Appellee. Appellant will not reply herein to the statements made in Appellee's Motion to Dismiss because to do so would be to ignore the basic questions of fundamental rights being raised before this Court.

Appellee's Motion to Dismiss charges that Appellant's contentions are founded upon a false premise. Appellee contends that it was not stipulated at bar that the electors in Cuyahoga County do not know their ward and precinct designations. The fact of the matter is that, during *Appellee's* argument, Chief Justice Taft of the Ohio Supreme Court, interrupted the argument to inquire if Appellee

would stipulate that the said electors did not know their ward and precinct. Chief Justice Taft informed Appellee that the Court was prepared to take judicial notice of the fact in any event. Appellee thereupon conceded the point. This fact is evidenced by the dissenting opinions of Judge O'Neill and Judge Duncan contained in the Appendix of Appellant's Jurisdictional Statement. Judge O'Neill stated (Appendix, page 25) that:

> "It is admitted that voters do not know the ward and precinct in which they reside."

Judge Duncan stated (Appendix, page 27) that:

> "It should be noted at the outset that counsel agree, and the fact is one of which the court may take judicial notice, that the ordinary voter does not know in which ward and precinct he resides."

Appellant agrees that lack of knowledge is no excuse in most instances before the law. However, the lack of knowledge stems, not from complacency or basic ignorance, but rather from the fact that an elector does not *need* to know this information to vote. Therefore, to require the elector to supply this information, admittedly difficult to learn, to validate a signature on a referendum petition, is to deny the rights of that elector.

REPLY TO MOTION TO DISMISS OR AFFIRM

The principal purpose of this Reply is to bring to this Court's attention two significant developments which affect the principles involved in this case.

1. Appellee, at page 8 of his Motion, concludes with a mere recital of the fact that R. C. 305.32 was amended effective August 18, 1969. Appellee states that "there is a large element of mootness in this case," and no precedent is needed for future Ohio cases. It is submitted that the fact is that the questions presented herein are not moot to the

1,800,000 persons living in Cuyahoga County, Ohio, who are paying the tax at the rate of more than one million dollars ($1,000,000) per month. The full text of R. C. 305.32, as amended, is set forth in the Supplemental Appendices attached hereto (Appendix A).

While no legislative history is available in Ohio, it is clear that the amendment of R. C. 305.32 was intended to correct the decision of the Ohio Supreme Court in this case. Research of the amending act reveals that the revision of R. C. 305.32 was *added* as an amendment to House Bill 531 (which originally dealt with other portions of Ohio law) *after* the decision of the Ohio Supreme Court, in this case, on June 18, 1969. This then is a recognition, by the Ohio General Assembly that the requirement as to ward and precinct in R. C. 305.32, was not in accord with its opinion of the law. The fact that another case, raising the same issue as this one, is unlikely to appear in Ohio does not lessen impact of the decision below in this case. The fact that the Ohio General Assembly, in effect, overruled the decision of the Ohio Supreme Court in this case, is little consolation to the 1,800,000 who are required to pay the tax without having had an opportunity to vote.

2. The second development is the announcement of the decision in *State ex rel. VanderWerf v. Warren, Auditor*, 20 Ohio St. 2d 9, (Decided October 9, 1969). In this case the same statute was considered by the Ohio Supreme Court, and, again in a prohibition context. The court, however, denied a writ of prohibition in the *VanderWerf* case, and Appellant submits that the opinion clearly shows a change in the court's attitude toward R. C. 305.31, et seq.

The *VanderWerf* case involved, among other issues, the failure of the circulators of the referendum petitions to file a *verified* copy of the county commissioner's resolution

before circulating the petitions. This requirement is imposed by R. C. 305.33 by the following language:

> "Whoever files a referendum petition against any resolution *shall*, before circulating such petition, file a verified copy of the resolution with the county auditor." (Emphasis added)

In approving the use of an unverified, but accurate copy of the resolution, the Court stated:

> "Clearly, the sole purpose of Section 305.33, Revised Code, is to assure, so far as is probable, that a true copy of the particular resolution which the circulators of a referendum petition wish to refer to an election is presented to the voters. We can perceive no valid reason to annul the referendum proceedings in this case, since the statutory purpose has unquestionably been accomplished.
>
> "It is not the apparent legislative intent that an unverified copy of the resolution filed with this county auditor is so critical a defect, *ipso facto*, as to void the referendum proceedings."

This decision, we submit, differs drastically from the strict construction given to the words, in R.C. 305.32, "signer * * * shall place * * *" by the same Court in this case. Absent also is the finding that the requirement is mandatory even though the word "shall" is used in both sections of the law. The Court's major concern is that the *purpose* of the requirement is satisfied. A review of the decision by the court in this case fails to reveal any discussion, by the majority, of a *purpose* for the ward and precinct requirement; in fact the majority opinion does not even mention the purpose of the requirement. Furthermore, the majority of the Court did not consider the *regardless* of the actual purpose of the requirement, the public officials involved actually affirmatively *waived* the benefits of the requirement as the same related to their duty under the law. The requirement that the voters be ad-

vised as to the exact resolution being petitioned is certainly as *crucial* as the ability to verify the validity of signatures on a referendum petition by use of ward and precinct designations.

CONCLUSION

The fact that the Ohio General Assembly has amended Revised Code Section 305.32 establishes that the decision below in this case was contrary to the principles recognized by the legislative body of the State of Ohio. The sales tax in question is being collected so the issues presented herein are not moot.

In addition, the Supreme Court of Ohio, in a later case, in its interpretation and construction of the statutes covering the sales tax has taken a position that is totally inconsistent with its position in this case.

Respectfully submitted,

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Ohio Revised Code §305.32

Any referendum petition may be presented in separate parts, but each part shall contain a full and correct copy of the title and text of the resolution sought to be referred. Each signer of any such petition must be an elector of the county in which the election, upon the resolution referred to by such referendum petition, is to be held, and shall place on such petition, after his name, the date of signing, his place of residence, including street and number, if any. Each part of such petition shall contain the affidavit of the person soliciting the signatures thereto, which affidavit shall state the number of signers of each part and that to the best of his knowledge and belief each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, that he believes such persons are electors of the county, and that they signed such petition with knowledge of the contents thereof. In determining the validity of any such petition, all signatures which are found to be irregular shall be rejected, but no petition shall be declared invalid in its entirety when one or more signatures are found to be invalid except when the number of valid signatures is found to be less than the total number required by section 305.31 of the Revised Code.

The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient. No resolution submitted to the electors of any county, and receiving an affirmative majority of the votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the resolution was procured, nor shall the rejection, by a majority of the votes cast thereon, of any resolution submitted to the electors of such county, be held invalid for such insufficiency.

Resolutions receiving an affirmative majority of the votes cast thereon, shall become effective on the first day of the month following certification by the board of elections of the official vote on such question.